Supreme Court, U.S.
FILED

No. 041584 MAY 23 2005

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In The

Supreme Court of the United States

CECIL RAY FRYE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, despite a plea agreement containing an appeal waiver, the remedial measures of *United States v. Booker* apply so as to have required the court to review the 584-month guilty plea sentence imposed for unreasonableness.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
A. Procedural History	2
B. Statement of the Facts	3
REASONS FOR GRANTING THE WRIT	3
CONCLUSION	4

TABLE OF AUTHORITIES

Page

CASES

Anders v. California, 386 U.S. 738 (1967) 2

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000) 3

Blakely v. Washington, 542 U.S. ____, 124 S.Ct. 2531 (2004) 3

Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708 (1987) 4

Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215 (1999) 3

United States v. Booker, 543 U.S. ____, 125 S.Ct. 738 (2005) 3

United States v. Grinard-Henry, 399 F.3d 1294 (11th Cir. 2005), *cert. denied* (May 16, 2005) (No. 04-9566) 4

United States v. Killgo, 397 F.3d 628 (8th Cir. 2005) 4

CONSTITUTION

5th Amendment, United States Constitution 1, 3

6th Amendment, United States Constitution 2, 3

STATUTES, RULES AND OTHER AUTHORITIES

18 U.S.C. § 3231 1

18 U.S.C. § 3553(a) 4

18 U.S.C. § 3742 1

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

OPINIONS BELOW

By published opinion, the Eleventh Circuit affirmed Frye's sentence. See *United States v. Frye*, ___F.3d ___, 2005 WL 315563 (11th Cir. decided February 10, 2005) appended hereto as Appendix C.

On March 11, 2005, the court withdrew that opinion and issued a new opinion, this time relying on the issue of waiver. See *United States v. Frye*, 402 F.3d 1123 (11th Cir. 2005), appended hereto as Appendix A and the Judgment In A Criminal Case at Appendix B.

STATEMENT OF JURISDICTION

The United States District Court for the Southern District of Alabama had original jurisdiction over this criminal case pursuant to 18 U.S.C. § 3231. An appeal from that court's final judgment proceeded for review by the United States Court of Appeals for the Eleventh Circuit, in accordance with 28 U.S.C. § 1291 and 18 U.S.C. § 3742. This Court's jurisdiction is invoked by the timely filing of this Petition for Writ of Certiorari. See 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War

or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

A. Procedural History

Cecil Ray Frye was originally named in a seven-count indictment alleging drug and gun counts. He was sentenced to a total of 548 months – 188 months as to the drug count, 60 months consecutively as to one gun count and 360 months consecutively as to a successive gun count.

Notice of appeal was timely filed. Former counsel moved to withdraw and filed a brief pursuant to *Anders v.*

California, 386 U.S. 738 (1967). He was instructed to brief four issues that the court felt were meritorious.[1]

His appeal was denied by published opinion and application for rehearing was made. The Eleventh Circuit withdrew its opinion and substituted the current opinion on March 11, 2005.

B. Statement of the Facts

Frye's attorney had also filed a motion to withdraw on the day of the guilty plea. Frye ultimately pleaded guilty but only after he had noted his disagreement with the "Factual Resume" tendered by the government. Frye protested and corrected and amended pleadings throughout the entire plea and sentencing process.

REASONS FOR GRANTING THE WRIT

The Circuit Court's finding that the waiver was valid because the plea was knowing and voluntary is not borne out by the record. And, even if so, the analysis should have gone further. Frye's Fifth and Sixth Amendment challenge was based on *United States v. Booker*, 543 U.S. ___, 125 S.Ct. 738 (2005), *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531 (2004), *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), and *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215 (1999). He objected that his sentence was imposed as a result of the Court's mistaken assumption that the guideline calculations and prior case law

[1] See Appendix D attached hereto.

did not provide for consideration that a 564-month guilty plea sentence might be unreasonable.

Relying on its recent case of *United States v. Grinard-Henry*, 399 F.3d 1294 (11th Cir. 2005), *cert. denied* (May 16, 2005) (No. 04-9566), the appellate court dismissed his appeal. This Court's directive, however, that pursuant to *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708 (1987) cases still pending on direct review are subject to review is clear. *Booker* at 769. The Eleventh Circuit should have reviewed the sentence imposed for unreasonableness, judging it with regard to the factors in 18 U.S.C. § 3553(a).[2]

CONCLUSION

The right to have the Court review a sentence for violations of the United States Constitution is fundamental. This Court should grant certiorari and reverse the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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[2] Cf. "While Killgo's appeal waiver is sufficient to bar his Sixth Amendment claim, we recognize that it did not waive the application of a constitutional standard of review on appeal. *United States v Killgo*, 397 F.3d n.4 (8th Cir. 2005).

APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-16377
Non-Argument Calendar

D.C. Docket No. 03-00093-CR-1-CG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CECIL RAY FRYE, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Alabama.

(Filed March 11, 2005)

Before CARNES, MARCUS and PRYOR, Circuit Judges.

PER CURIAM:

We withdraw our previous opinion, which was published at *United States v. Frye*, ___ F.3d ___, 2005 WL 315563 (11th Cir. Feb. 10, 2005), and substitute the following judgment and opinion. We now dismiss the appeal of the alleged sentencing errors based on the appeal waiver in the plea agreement.

This appeal presents four issues, the second of which is an issue of first impression in the Eleventh Circuit: (1) whether Cecil Ray Frye Jr.'s guilty plea to one count of conspiracy to manufacture methamphetamine under 21 U.S.C. section 846 and two counts of using or carrying a firearm in connection with a drug felony under 18 U.S.C. section 924(c) was knowing and voluntary; (2) whether Frye was properly convicted of the firearms charges under section 924(c) when he was not convicted of the predicate offenses; (3) whether there was an insufficient factual basis to support the firearms convictions; and (4) whether Frye's sentence violated *United States v. Booker*, 125 S. Ct. 738 (2005). We conclude that (1) Frye's plea was knowing and voluntary, (2) a conviction on the predicate offense is not necessary for a conviction under section 924(c), (3) the firearms convictions are supported by the record, and (4) Frye waived his right to appeal his sentence in his plea agreement with the government. We, therefore, affirm the judgment of conviction and dismiss the appeal of Frye's sentence.

I. BACKGROUND

On May 29, 2003, Frye was charged by superseding indictment with seven counts related to drug trafficking and firearms possession, four counts of which are relevant to this appeal. Count One of the indictment charged Frye with conspiracy to manufacture more than 500 grams of methamphetamine. Count Four charged Frye with an attempt to manufacture more than 50 grams of methamphetamine. Count Five charged that during and in relation to the offense charged in Count Four, Frye knowingly used, carried, and possessed a firearm, and Count Six charged that during and in relation to the offense of

attempting to manufacture methamphetamine, Frye knowingly used, carried, and possessed a firearm. Count Six did not reference any other count in the indictment.

Frye pleaded guilty to Counts One, Five, and Six, and the government dismissed the remaining charges. The plea agreement contained a limited waiver of the right to appeal the sentence with three exceptions:

> 20. The defendant acknowledges that he is aware that Title 18, United States Code, Section 3742 affords a defendant the right to appeal his sentence. In exchange for the recommendations made by the United States in this agreement, the defendant knowingly waives the right to appeal any sentence imposed in the instant case, except for those rights specifically reserved in paragraph 22 below.
>
> . . . .
>
> 22. The defendant reserves the right to contest in any appeal or post-conviction proceeding any of the following:
>
> a. Any punishment imposed in excess of the statutory maximum;
>
> b. Any punishment that constitutes an upward departure from the guidelines range; or
>
> c. A claim of ineffective assistance of counsel.

Before accepting the plea, the district court extensively questioned Frye in a Rule 11 colloquy concerning his knowledge of the charges against him, the rights he possessed as a criminal defendant, including the right to a jury trial, and the consequences of pleading guilty, including the waiver of the right to appeal. Frye then pleaded

guilty. The district court determined that the plea was voluntary and knowing, and it accepted the plea.

After the sentencing hearing, at which Frye stated that he had no objections to the presentence investigation report that would affect the guideline calculations, the district court sentenced Frye to a total term of 548 months' imprisonment and five years' supervised release. Frye filed a timely notice of appeal.

II. STANDARD OF REVIEW

The voluntariness of a guilty plea is reviewed *de novo*. *United States v. Brown*, 117 F.3d 471, 474 (11th Cir. 1997). We review issues of statutory construction *de novo*. *United States v. Mikell*, 102 F.3d 470, 474 (11th Cir. 1996). "[W]e will not overturn a judge's decision to accept a guilty plea unless there has been an abuse of discretion." *United States v. Owen*, 858 F.2d 1514, 1516 (11th Cir. 1988).

III. DISCUSSION

"A plea of guilty cannot support a judgment of guilt unless it was voluntary in a constitutional sense." *Brown*, 117 F.3d at 476. A plea is voluntary in a constitutional sense if the defendant receives real notice of the charge against him and understands the nature of the constitutional protections he is waiving. *Id.* Frye contests the knowing and voluntary nature of his guilty plea. We first, therefore, determine whether Frye knowingly and voluntarily pleaded guilty. We then address Frye's remaining arguments on appeal.

To circumvent the detailed Rule 11 colloquy, Frye contends that the criminal proceeding as a whole undermined

the knowing and voluntary nature of his plea. Specifically, Frye argues that the district court neglected to inquire adequately concerning the motion to withdraw due to irreconcilable differences that Frye's counsel had filed the morning of the plea hearing. This argument fails.

To determine that a guilty plea is knowing and voluntary the district court must establish that "(1) the guilty plea [is] free from coercion; (2) the defendant . . . understand[s] the nature of the charges; and (3) the defendant . . . know[s] and understand[s] the consequences of his guilty plea." *United States v. Mosely*, 173 F.3d 1318, 1322 (11th Cir. 1999). Here the district court explicitly asked Frye about the motion to withdraw, and Frye responded that he was satisfied with his representation and that the difficulty had passed. The district court further discussed with Frye in detail the plea agreement, elements of each offense, burden of proof, and consequences of pleading guilty. Frye stated under oath that he was not coerced into pleading guilty, that he understood the charges and consequences of pleading guilty, and that he pleaded guilty. The record shows that Frye understood the charges against him and his options, and that he voluntarily and knowingly pleaded guilty.

Second, Frye argues that he could not be convicted of using or carrying a firearm in connection with a drug trafficking crime under 18 U.S.C. section 924(c) because he was not convicted of the predicate drug offense for Count Five or charged with the predicate offense for Count Six. Whether a defendant can be found guilty under section 924(c) when he was not convicted of the predicate offense or separately charged with the predicate offense is an issue of first impression in this circuit. We hold that conviction under section 924(c) does not require either that

the defendant be convicted of or charged with the predicate offense.

Section 924(c)(1)(A) makes it a crime for any person to use or carry a firearm "during and in relation to any . . . drug trafficking crime . . . for which the person may be prosecuted in a court of the United States. . . ." 18 U.S.C. § 924(c)(1)(A). A "drug trafficking crime" includes any crime punishable under the Controlled Substances Act, 21 U.S.C. section 801, *et seq.* 18 U.S.C. § 924(c)(2). By its plain language, section 924 does not require that a defendant be convicted of, or even charged with, the predicate offense to be found guilty of using or carrying a firearm in relation to the predicate offense. Section 924(c) requires only that the drug trafficking crime be one that "may be prosecuted." Frye, therefore, was properly convicted of violating section 924(c)(a) despite that he was not convicted of the predicate offense on Count Five or charged with a predicate offense on Count Six.

The other circuits that have addressed this issue have reached the same conclusion we reach today. *United States v. Carter*, 300 F.3d 415, 425 (4th Cir. 2002); *United States v. Lake*, 150 F.3d 269, 274-75 (3d Cir. 1998); *United States v. Nelson*, 27 F.3d 199, 200 (6th Cir. 1994); *United States v. Myers*, 993 F.2d 171, 172 (8th Cir. 1993); *United States v. Hill*, 971 F.2d 1461, 1467 (10th Cir. 1992); *United States v. Munoz-Fabela*, 896 F.2d 908, 910-11 (5th Cir. 1990); *United States v. Hunter*, 887 F.2d 1001, 1003 (9th Cir. 1989). In *Munoz-Fabela*, the Fifth Circuit held that "only the fact of the offense, and not a conviction, . . . is needed to establish the required predicate," and concluded that the charge of possession of cocaine with intent to distribute, which was contained in the first indictment but of which Munoz was not convicted, was a sufficient "drug

trafficking offense" within the meaning of section 924(c). 896 F.2d at 910-11. Similarly, in *Hunter*, the Ninth Circuit held that "a defendant charged with violating section 924(c)(1) must be proven to have committed the underlying crime, but nothing in the statute or the legislative history suggests he must be separately charged with and convicted of the underlying offense." 887 F.2d at 1003. We agree with their reading of the plain language of section 924.

Third, Frye argues that there was an insufficient factual basis in the record to support the convictions on Counts Five and Six. Rule 11(b)(3) requires that, before accepting a guilty plea, a district court "must determine that there is a factual basis for the plea." Fed.R.Crim.P. 11(b)(3). "The purpose of this requirement is to protect a defendant who mistakenly believes that his conduct constitutes the criminal offense to which he is pleading." *United States v. Lopez*, 907 F.2d 1096, 1100 (11th Cir. 1990) (citing *McCarthy v. United States*, 394 U.S. 459, 467, 89 S. Ct. 1166, 1171 (1969)). "The standard for evaluating challenges to the factual basis for a guilty plea is whether the trial court was presented with evidence from which it could reasonably find that the defendant was guilty." *Id.* The facts presented by the parties to enable the trial court to perform its role, under Rule 11(b)(3), were contained in nine pages of admissions by Frye, which the parties entitled the "factual resume," so we must evaluate Frye's argument against his admissions in that factual resume.

To convict a defendant under section 924(c)(1), the government must demonstrate that the defendant used or carried a firearm, during and in relation to a drug trafficking crime. *Smith v. United States*, 508 U.S. 223, 227-28, 113 S. Ct. 2050, 2053 (1993). A defendant carries a firearm

if it is carried directly on his person or carried in his vehicle. *Muscarello v. United States*, 524 U.S. 125, 131, 118 S. Ct. 1911, 1916 (1998). To prove the "in relation to" requirement, the government must demonstrate that the firearm had "some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." *Smith*, 508 U.S. at 238, 113 S. Ct. at 2058-59. "The gun at least must facilitate, or have the potential of facilitating, the drug trafficking offense." *Id.* at 238, 113 S. Ct. at 2059 (citations and internal punctuation omitted).

The factual resume provides sufficient facts for the district court reasonably to have determined that the defendant was guilty. The resume states that, during the attempt to manufacture methamphetamine at issue in Count Five, Frye carried a Colt revolver in his left jacket pocket while transporting chemicals and equipment. The resume also states that Frye carried a Ruger 9 mm semi-automatic pistol during the attempted theft of anhydrous ammonia for making methamphetamine at issue in Count Six because the Ruger was found in plain view in the vehicle with Frye. A reasonable factfinder could have concluded that in each case the gun facilitated or had the potential to facilitate the offense. The district court did not abuse its discretion when it accepted the plea.

Finally, Frye argues that the district court erroneously enhanced his sentence using mandatory sentencing guidelines, but the government correctly responds that this argument should be dismissed because it is within the scope of the sentence appeal waiver. In the plea agreement, Frye waived his right to appeal his sentence on any ground other than that (1) the sentence was imposed in excess of the statutory maximum; (2) the sentence constitutes an

upward departure from the guideline range; or (3) he was deprived of effective assistance of counsel. Frye's appeal does not fall within any of the exceptions to his appeal waiver. "An appeal waiver includes the waiver of the right to appeal difficult or debatable legal issues or even blatant error . . . Specifically, 'the right to appeal a sentence based on *Apprendi/Booker* grounds can be waived in a plea agreement. Broad waiver language covers those grounds of appeal.'" *United States v. Grinard-Henry*, ___ F.3d ___, 2005 WL 327265, *2 (11th Cir. Feb. 11, 2005) (citing *United States v. Rubbo*, ___ F.3d ___, 2005 WL 120507, *5 (11th Cir. Jan. 21, 2005) (internal citation omitted)).

Frye's only response to the argument of the government that he waived his right to appeal is that the plea agreement was not knowing and voluntary. As discussed earlier, we reject Frye's argument that his plea agreement was not knowing and voluntary. Frye's appeal of his sentence, therefore, is barred by the knowing and voluntary appeal waiver contained in his plea agreement. *See Rubbo*, 396 F.3d 1330.

IV. CONCLUSION

Because Frye knowingly and voluntarily pleaded guilty, the district court did not abuse its discretion when it accepted the guilty plea. We dismiss Frye's appeal of his sentence, because Frye waived his right to appeal that issue.

AFFIRMED in part and DISMISSED in part.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA

V.

CECIL RAY FRYE, JR.

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

CASE NUMBER:
1:02-CR-00093-001

F. Luke Coley, Esquire
Defendant's Attorney

(X) pleaded guilty to counts 1, 5 & 6 of the Superseding Indictment on 6/27/2003.

( ) pleaded nolo contendere to count(s) ___ which was accepted by the court.

( ) was found guilty on count(s) ___ after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count No.(s)
21 USC 846	Conspiracy to manufacture methamphetamine.	05/07/2003	1
18 USC 924(c)(1)	Possession of a firearm during a drug trafficking felony.	02/19/2002	5
18 USC 924(c)(1)	Possession of a firearm during a drug trafficking felony.	10/04/2001	6

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

( ) The defendant has been found not guilty on count(s) ___.

(X) Counts 2, 3, 4 & 7 are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United Stats Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Social Security No. 417-19-6346
Defendant's Date of Birth: 09/29/1966
Defendant's U.S.M. No.: 08444-003
Defendant's Residence Address
708 Ann Street
Saraland, AL 36571
Defendant's Mailing Address:

December 4, 2003
Date of Imposition of Judgment

/s/ Callie V. S. Granade
CHIEF UNITED STATES DISTRICT JUDGE

December 10, 2003
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a

total **term** of **FIVE HUNDRED FORTY-EIGHT (548) MONTHS, said term consists of 188 months on Count One, 60 months on Count 5, to run consecutively with sentence imposed in Count 1, and 300 months on Count 6, to run consecutively with sentences imposed in Counts 1 and 5.**

(X) The court makes the following recommendations to the Bureau of Prisons: **that the defendant be imprisoned at an institution where a residential, comprehensive, a substance abuse treatment program is available.**

(X) The defendant is remanded to the custody of the United States Marshal.

( ) The defendant shall surrender to the United States Marshal for this district:

( ) at ___a.m./p.m. on ___.

( ) as notified by the United States Marshal.

( ) The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

( ) before 2 p.m. on ___.

( ) as notified by the United States Marshal.

( ) as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 years on each of Counts 1, 5 & 6. Said terms to run concurrently**.

(X) Special Conditions: **1) the defendant shall participate in a program of testing and treatment for drug and/or alcohol abuse, as directed by the Probation Office;**
(2) the defendant is prohibited from making major purchases, incurring new credit charges, or opening additional lines of credit without approval of the Probation Office, until such time as the financial obligations imposed by this order having been satisfied in full;
3) the defendant shall provide the Probation Office access to any requested financial information; and
4) The defendant shall make restitution as set forth on Sheets 5, Part A & 5, Part B of this Judgment.

For offenses committed on or after September 13, 1994: The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

( ) The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable)

(X) **The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.**

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment. The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.
The defendant shall not illegally possess a controlled substance.
The defendant shall comply with the standard conditions that have been adopted by this court (Probation Form 7a).
The defendant shall also comply with the additional conditions on the attached page (if applicable).

See Page 4 for the "STANDARD CONDITIONS OF SUPERVISION"

SUPERVISED RELEASE

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours or being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

14) the defendant shall cooperate, as directed by the probation officer, in the collection of DNA, if applicable, under the provisions of 18 U.S.C. §§ 3563(a)(9) and 3583(d) for those defendants convicted of qualifying offenses.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$300.00		$9,546.00

( ) The determination of restitution is deferred until ___. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such a determination.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below. **(or see attached)** However, pursuant to 18 U.S.C. § 3644(i), all non-federal victims must be paid in full prior to the United States receiving payment.

(X) The defendant shall make restitution to the following payees in the amounts listed below.

Name(s) and Address(es) of Payee(s) Payment	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or % of
Drug Enforcement Administration 901 Western America Circle, Suite 501 Mobile, Alabama 36609		$9,546.00	
TOTALS:	$	$9,546.00	

(X) If applicable, restitution amount ordered pursuant to plea agreement **$9,546.00**

( ) The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part

B may be subject to penalties for default, pursuant to 18 U.S.C. § 3612(g).

(X) The court determined that the defendant does not have the ability to pay interest and it is ordered that:

(X) The interest requirement is waived for the ( ) fine and/or (X) restitution.

( ) The interest requirement for the ( ) fine and/or ( ) restitution is modified as follows:

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A (X) Lump sum payment of $9,846.00 due immediately, balance due ( ) not later than ___, or (X) in accordance with ( ) C, ( ) D, or (X) E below; or

B ( ) Payment to begin immediately (may be combined within ( ) C, ( ) D, or ( ) E below); or

C ( ) Payment in ___ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of ___ (e.g., months or years), to commence ___ (e.g., 30 or 60 days) after the date of this judgment; or

D ( ) Payment in ___ (e.g., equal, weekly, monthly, quarterly) installments of $___ over a period of

___ (e.g., months or years), to commence ___ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E (X) Special instructions regarding the payment of criminal monetary penalties: Restitution is due immediately and payable in full, and is to be paid through the Clerk, U.S. District court. If full restitution is not immediately paid, any amount owing during a period of incarceration shall be subject to payment through the Bureau of Prison's Inmate Financial Responsibility Program. As a special condition of supervised release, the Probation Office shall pursue collection of any balance remaining at the time of release in installments to commence no later than 30 days after the date of release. If restitution is to be paid in installments, the court orders that the defendant make a least minimum monthly payments in the amount of $50.00; and further orders that no interest shall accrue on this debt. The defendant is ordered to notify the court of any material change in his ability to pay restitution. The Probation Office shall request the court to amend any payment schedule, if appropriate.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the clerk of court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

( ) **Joint** and Several:

( ) The defendant shall pay the cost of prosecution.

( ) The defendant shall pay the following court cost(s):

( ) The defendant shall **forfeit** the defendant's interest in the following property to the United States.

Payments shall be applied in the following order: (1) assessment; (2) restitution principal; (3) restitution interest, (4) fine principal; (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX C

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-16377
Non-Argument Calendar

D. C. Docket No. 03-00093-CR-1-CG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CECIL RAY FRYE, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Alabama.

(Filed February 10, 2005)

Before CARNES, MARCUS, and PRYOR, Circuit Judges.

PER CURIAM:

This appeal presents four issues, the second of which is an issue of first impression in the Eleventh Circuit: (1) whether Cecil Ray Frye Jr.'s guilty plea to one count of conspiracy to manufacture methamphetamine under 21 U.S.C. section 846 and two counts of using or carrying a firearm in connection with a drug felony under 18 U.S.C. section 924(c) was knowing and voluntary; (2) whether Frye was properly convicted of the firearms charges under

section 924(c) when he was not convicted of the predicate offenses; (3) whether there was an insufficient factual basis to support the firearms convictions; and (4) whether Frye's sentence violated the Sixth Amendment under *United States v. Booker*, 125 S. Ct. 738 (2005). We conclude that (1) Frye's plea was knowing and voluntary, (2) a conviction on the predicate offense is not necessary for a conviction under section 924(c), (3) the firearms convictions are supported by the record, and (4) because Frye admitted the facts used by the district court to calculate his sentence, the sentence did not violate the Sixth Amendment. We, therefore, affirm the district court.

I. BACKGROUND

On May 29, 2003, Frye was charged by superseding indictment with seven counts related to drug trafficking and firearms possession, four counts of which are relevant to this appeal. Count One of the indictment charged Frye with conspiracy to manufacture more than 500 grams of methamphetamine. Count Four charged Frye with an attempt to manufacture more than 50 grams of methamphetamine. Count Five charged that during and in relation to the offense charged in Count Four, Frye knowingly used, carried, and possessed a firearm, and Count Six charged that during and in relation to the offense of attempting to manufacture methamphetamine, Frye knowingly used, carried, and possessed a firearm. Count Six did not reference any other count in the indictment.

Frye pleaded guilty to Counts One, Five, and Six, and the government dismissed the remaining charges. Before accepting the plea, the district court extensively questioned Frye in a Rule 11 colloquy concerning his knowledge of the

charges against him, the rights he possessed as a criminal defendant, and the consequences of pleading guilty. Frye then pleaded guilty. The district court determined that the plea was voluntary and knowing and accepted the plea.

After the sentencing hearing, at which Frye stated that he had no objections to the presentence investigation report that would affect the guideline calculations, the district court sentenced Frye to a total term of 548 months' imprisonment and five years' supervised release. Frye filed a timely notice of appeal.

II. STANDARD OF REVIEW

The voluntariness of a guilty plea is reviewed *de novo*. *United States v. Brown*, 117 F.3d 471, 474 (11th Cir. 1997). We review issues of statutory construction *de novo*. *United States v. Mikell*, 102 F.3d 470, 474 (11th Cir. 1996). "[W]e will not overturn a judge's decision to accept a guilty plea unless there has been an abuse of discretion." *United States v. Owen*, 858 F.2d 1514, 1516 (11th Cir. 1988). Finally, because Frye did not object to his sentence at sentencing, our review is limited to plain error. *United States v. Duncan*, 381 F.3d 1070, 1073 (11th Cir. 2004).

III. DISCUSSION

"A plea of guilty cannot support a judgment of guilt unless it was voluntary in a constitutional sense." *Brown*, 117 F.3d at 476. A plea is voluntary in a constitutional sense if the defendant receives real notice of the charge against him and understands the nature of the constitutional protections he is waiving. *Id.* Frye contests the knowing and voluntary nature of his guilty plea. We first,

therefore, determine whether Frye knowingly and voluntarily pleaded guilty. We then address Frye's remaining arguments on appeal.

To circumvent the detailed Rule 11 colloquy, Frye contends that the criminal proceeding as a whole undermined the knowing and voluntary nature of his plea. Specifically, Frye argues that the district court neglected to inquire adequately concerning the motion to withdraw due to irreconcilable differences that Frye's counsel had filed the morning of the plea hearing. This argument fails.

To determine that a guilty plea is knowing and voluntary the district court must establish that "(1) the guilty plea [is] free from coercion; (2) the defendant . . . understand[s] the nature of the charges; and (3) the defendant . . . know[s] and understand[s] the consequences of his guilty plea." *United States v. Mosely*, 173 F.3d 1318, 1322 (11th Cir. 1999). Here the district court explicitly asked Frye about the motion to withdraw, and Frye responded that he was satisfied with his representation and that the difficulty had passed. The district court further discussed the plea agreement, elements of each offense, burden of proof, and consequences of pleading guilty with Frye in detail. Frye responded that he was not coerced into pleading guilty, that he understood the charges and consequences of pleading guilty, and that he pleaded guilty. The record shows that Frye understood the charges against him and his options, and that he voluntarily and knowingly pleaded guilty.

Second, Frye argues that he could not be convicted of using or carrying a firearm in connection with a drug trafficking crime under 18 U.S.C. section 924(c) because he was not convicted of the predicate drug offense for

Count Five or charged with the predicate offense for Count Six. Whether a defendant can be found guilty under section 924(c) when he was not convicted of the predicate offense or separately charged with the predicate offense is an issue of first impression in this circuit. We hold that conviction under section 924(c) does not require either that the defendant be convicted of or charged with the predicate offense.

Section 924(c)(1)(A) makes it a crime for any person to use or carry a firearm "during and in relation to any . . . drug trafficking crime . . . for which the person may be prosecuted in a court of the United States. . . . " 18 U.S.C. § 924(c)(1)(A). A "drug trafficking crime" includes any crime punishable under the Controlled Substances Act, 21 U.S.C. section 801, *et seq.* 18 U.S.C. § 924(c)(2). By its plain language, section 924 does not require that a defendant be convicted of, or even charged with, the predicate offense to be found guilty of using or carrying a firearm in relation to the predicate offense. Section 924(c) requires only that the drug trafficking crime be one that "may be prosecuted." Frye, therefore, was properly convicted of violating section 924(c)(a) despite that he was not convicted of the predicate offense on Count Five or charged with a predicate offense on Count Six.

The other circuits that have addressed this issue have reached the same conclusion we reach today. *United States v. Carter*, 300 F.3d 415, 425 (4th Cir. 2002); *United States v. Lake*, 150 F.3d 269, 274-75 (3d Cir. 1998); *United States v. Nelson*, 27 F.3d 199, 200 (6th Cir. 1994); *United States v. Myers*, 993 F.2d 171, 172 (8th Cir. 1993); *United States v. Hill*, 971 F.2d 1461, 1467 (10th Cir. 1992); *United States v. Munoz-Fabela*, 896 F.2d 908, 910-11 (5th Cir. 1990); *United States v. Hunter*, 887 F.2d 1001, 1003 (9th Cir.

1989). In *Munoz-Fabela*, the Fifth Circuit held that "only the fact of the offense, and not a conviction, . . . is needed to establish the required predicate," and concluded that the charge of possession of cocaine with intent to distribute, which was contained in the first indictment but of which Munoz was not convicted, was a sufficient "drug trafficking offense" within the meaning of section 924(c). 896 F.2d at 910-11. Similarly, in *Hunter*, the Ninth Circuit held that "a defendant charged with violating section 924(c)(1) must be proven to have committed the underlying crime, but nothing in the statute or the legislative history suggests he must be separately charged with and convicted of the underlying offense." 887 F.2d at 1003. We agree with their reading of the plain language of section 924.

Third, Frye argues that there was an insufficient factual basis in the record to support the convictions on Counts Five and Six. Rule 11(b)(3) requires that, before accepting a guilty plea, a district court "must determine that there is a factual basis for the plea." Fed. R. Crim. P. 11(b)(3). "The purpose of this requirement is to protect a defendant who mistakenly believes that his conduct constitutes the criminal offense to which he is pleading." *United States v. Lopez*, 907 F.2d 1096, 1100 (11th Cir. 1990) (citing *McCarthy v. United States*, 394 U.S. 459, 467, 89 S. Ct. 1166, 1171 (1969)). "The standard for evaluating challenges to the factual basis for a guilty plea is whether the trial court was presented with evidence from which it could reasonably find that the defendant was guilty." *Id.* The facts presented by the parties to enable the trial court to perform its role, under Rule 11(b)(3), were contained in nine pages of admissions by Frye, which the parties

entitled the "factual resume," so we must evaluate Frye's argument against his admissions in that factual resume.

To convict a defendant under section 924(c)(1), the government must demonstrate that the defendant used or carried a firearm, during and in relation to a drug trafficking crime. *Smith v. United States*, 508 U.S. 223, 227-28, 113 S. Ct. 2050, 2053 (1993). A defendant carries a firearm if it is carried directly on his person or carried in his vehicle. *Muscarello v. United States*, 524 U.S. 125, 131, 118 S. Ct. 1911, 1916 (1998). To prove the "in relation to" requirement, the government must demonstrate that the firearm had "some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." *Smith*, 508 U.S. at 238, 113 S. Ct. at 2058-59. "The gun at least must facilitate, or have the potential of facilitating, the drug trafficking offense." *Id.* at 238, 113 S. Ct. at 2059 (citations and internal punctuation omitted).

The factual resume provides sufficient facts for the district court reasonably to have determined that the defendant was guilty. The resume states that, during the attempt to manufacture methamphetamine at issue in Count Five, Frye carried a Colt revolver in his left jacket pocket while transporting chemicals and equipment. The resume also states that Frye carried a Ruger 9 mm semi-automatic pistol during the attempted theft of anhydrous ammonia for making methamphetamine at issue in Count Six because the Ruger was found in plain view in the vehicle with Frye. A reasonable factfinder could have concluded that in each case the gun facilitated or had the potential to facilitate the offense. The district court did not abuse its discretion when it accepted the plea.

Finally, Frye argues that the district court erred when it enhanced his sentence based on factors that were neither admitted by him nor proved beyond a reasonable doubt in violation of his Sixth Amendment rights. Frye objects to the enhancement he received for being an organizer in the conspiracy under U.S.S.G. section 3B1.1(a) and for risk of harm to human life or the environment under U.S.S.G. section 2D1.1(b)(5)(B). Frye's argument is belied by the record.

In *Blakely v. Washington*, the Supreme Court held that the imposition of a sentencing enhancement must be supported by facts that were either admitted by the defendant or found beyond a reasonable doubt by the jury, *Blakely v. Washington*, 124 S. Ct. 2531, 2538 (2004), and in *Booker*, the Supreme Court extended the reasoning of *Blakely* to the federal sentencing guidelines. The *Booker* Court concluded, in the opinion written by Justice Stevens, "Accordingly we reaffirm our holding in *Apprendi*: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Booker*, 125 S. Ct. at 756. So long as Frye in pleading guilty admitted the facts that support the enhancement of his sentence, there is no violation of the Sixth Amendment.

The record shows that the facts admitted by Frye, in the factual resume submitted to the district court as part of the guilty plea, support the two enhancements to his sentence. First, an enhancement under section 3B1.1(a) is supported if the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive. U.S.S.G. § 3B1.1(a). In the

factual resume, Frye admitted that the government could prove beyond a reasonable doubt that he recruited various individuals to steal ingredients to make methamphetamine, distributed methamphetamine as payment for services and rent, paid one individual to make the drugs, and instructed another how to "cook" the methamphetamine. Frye admitted that the conspiracy involved at least ten participants. Frye's admissions support the finding of the district court that Frye was an organizer in the offense.

Second, an enhancement under section 2D1.1(b)(5)(B) is appropriate if the offense (1) involved the manufacture of methamphetamine and (2) created a substantial risk of harm to human life or the environment. U.S.S.G. § 2D1.1(b)(5)(B). The offense to which Frye pleaded guilty was conspiracy to manufacture methamphetamine, and in the resume, Frye admitted that, in the course of the conspiracy, he manufactured approximately three to four ounces of methamphetamine per week. Frye also admitted that he "cooked" methamphetamine at three separate residential locations and that protective gear was required to clear a clandestine methamphetamine laboratory. These admissions are sufficient to support the finding by the district court that the offense involved a substantial risk to human life or the environment. *See United States v. Layne*, 324 F.3d 464, 468-71 (6th Cir. 2003). The sentence, therefore, did not violate the Sixth Amendment as explicated in *Booker*, and the district court did not err.

IV. CONCLUSION

Because Frye knowingly and voluntarily pleaded guilty, the district court did not abuse its discretion when

it accepted the guilty plea, and the sentence did not violate the Sixth Amendment, we **AFFIRM.**

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-16372

District Court Docket No. 03-00093-CR-1-CG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CECIL RAY FRYE, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Alabama

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ORDER

(Filed Jul. 2, 2004)

Counsel in this direct criminal appeal has moved to withdraw and filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Counsel claims that this appeal presents no arguably meritorious issue. Our independent review of the entire record reveals otherwise. Accordingly, counsel's motion to withdraw is DENIED and counsel is DIRECTED to brief the following issues and any other issue he deems arguable:

1. Whether Frye properly was convicted on Count Five when he was not convicted of the predicate offense?

2. Whether Frye properly was convicted on Cont Six when he was neither charged with nor convicted of the predicate offense?

3. If there was such a defect as to Count Five or Count Six, whether such was a nonjurisdictional defect that was waived by the guilty plea?

/s/ [Illegible]
UNITED STATES
CIRCUIT JUDGE